BUSINESS NECESSITY AND HOSTILE WORK ENVIRONMENT: AN EVOLUTIONARY STEP FORWARD FOR TITLE VII

I. INTRODUCTION

So, imagine that you are a bright, young college graduate. You are also a female. The first interview that you get is with a new internet magazine that was launched only a few months ago. The job you are interviewing for is merely an administrative position that has nothing to do with site content, but you think you should go on the interview anyway. When you get there, you realize that the internet magazine specializes in celebrity gossip, weird news stories and current sexual issues affecting people in your age range. After a generous offer, you decide to take the position and build your resume, but after a few months you notice that something is changing. The celebrity gossip and sexual issues are merging, and evolving, into a new animal—they are now one column that seeks to shock people with ridiculous sex stories about celebrities, and contains graphic, vulgar content that, quite frankly, offends you. No longer is the site about funny gossip and interesting anecdotes; rather, it is vulgarity and obscenity at its best—but everyone, including your boss, is very happy because the number of hits to the site has tripled.

Much to your dismay, the situation gets worse. The writers with whom you work particularly closely begin using the vulgar terms, jokes and stories that they are responsible for on the site in their own conversations in the office. The question is: what can you do about it? You try complaining to your boss but he tells you that dealing with vulgarity is part of the job and his employees need to speak in that manner in order to write better content—to get ideas. Your best friend, to whom you turn for advice over coffee, wrote a paper in college about sexual harassment cases and advises you to try to sue under Title VII. You take up her advice, but do you have a claim; or, more importantly, does your employer's need to use vulgarity outweigh your own right to be free from such behavior in your place of work?

This is the subject of this Note. Title VII[1] is perhaps the biggest single step that this country has taken to eliminate discrimination in the workplace. The provision relevant to this Note serves to prevent harassment in the workplace based on race, sex, color, religion or national origin.[2] Under Title VII, it is not only discriminatory hiring,

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1. Civil Rights Act of 1991, 42 U.S.C. §§ 2000e to 2000e-17 (2005).
2. *Id.* § 2000e-2(a)(1).

firing, placing and promoting that is prohibited, but also maintaining a work environment that is "hostile" to a member of one of the protected classes.[3] However, Title VII may be protecting too much in some situations. For example, in the offices of a sexually themed magazine, it would not be unreasonable to assume that sex is frequently discussed among the writers. Should that type of employer be held liable for engaging in, even promoting, the exact behavior or conversations that is the essence of her business?

Thus far, it seems that the answer is "possibly." In *Lyle v. Warner Brothers Television Productions*,[4] currently before the California Supreme Court, the employee was a writer's assistant on the television show "Friends."[5] Her grounds for a hostile work environment claim are that she witnessed the writers, whom she worked for, engage in constant, juvenile, offensive conduct.[6] One of Warner Brothers' defenses to the claim is that the creative necessity of the working environment justified the offensive conduct.[7] Thus far, the California Court of Appeal has held that the creative necessity of the environment is just one factor for the jury to consider among the totality of the circumstances,[8] but Warner Brothers petitioned for review and the Supreme Court of California granted its request.[9]

Unfortunately, the Court of Appeal's answer was the wrong one to the extent that it held only a jury can make that determination. The evolution of sexual discrimination claims, in general, has allowed for certain exceptions, albeit narrow ones, but no necessity exception has been recognized as of yet that applies to the hostile work environment cause of action, and the California court dropped the ball. Allowing a necessity defense to be utilized by employers in hostile work environment actions does not offend any of the fundamental policies served by the cause of action itself nor does it conflict with any settled precedent in the area. There is no need, even, to adopt a completely new defense to deal with this issue, for one already exists. This Note advocates applying the business necessity defense previously employed in disparate impact cases, and its burden-shifting framework of production, to the hostile work environment claim as well.

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3. Meritor Sav. Bank v. Vinson, 477 U.S. 57, 66 (1986); EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11(a)(3) (2005).

4. 12 Cal. Rptr. 3d 511 (Cal. Ct. App. 2004), *review granted*, *depublished by*, 94 P.3d 476 (Cal. 2004).

5. *Id.* at 513.

6. *See id.*

7. *See id.* at 513, 518.

8. *See id.* at 518.

9. Lyle v. Warner Bros. Television Prods., 94 P.3d 476 (Cal. 2004).

Why should we adopt the defense; is the "necessity question" not a question for the jury? The answer is simple. Until a court actually tells us that certain offensive speech in the workplace is okay by applying the defense and setting a precedent, these cases continue to go to the jury, where jury nullification may be one problem,[10] but others are judicial efficiency and economy. The power of a judicial precedent is unquestioned in the legal field. It is time that a court stand up and affirmatively say that while most offensive speech is prohibited by Title VII, not all of it is, and from this day forward we are not going to subject these types of businesses to costly and risky trials so long as they meet their newly established burden. "Art imitates life" is the most appropriate saying to this end and is the exact saying that should be guiding courts in these cases. Provocative writers' ideas come from real-life conversations, not only in their life, but in the workplace as well. The reasonable person knows and understands this concept and could not possibly find that vulgar or obscene language in this particular situation violates Title VII—so we should allow for a necessity defense to make its way into hostile work environment claims.

Parts I and II will discuss the *Lyle* case and some of the exceptions recognized in current discrimination law, advocating that the business necessity defense recognized in disparate impact cases should be applied in hostile work environment actions. Part III will then show how applying the necessity defense does not offend any of the traditional principles sought to be protected by the hostile work environment claim nor come in conflict with any of the current precedent surrounding it.

II. THE NECESSITY ISSUE

A. Lyle v. Warner Brothers

Defendants are the producers and writers of the television show "Friends."[11] The plaintiff-employee's job as the writers' assistant was to take detailed notes of the conversations that went on inside the writers' room among the writers so that, later on, the writers could refer to her notes and extract the dialogue and jokes that would most likely be used in the script.[12] Lyle's evidence of sexual harassment included allegations

10. "[T]he last thing an employer wants to do is to go to a jury on a factual dispute over 'he said' versus 'she said.' In these circumstances, even if there was no sexual harassment, a jury may resolve the conflicting testimony against the party with the 'deep pockets.'" Allan H. Weitzman, *Employer Defenses to Sexual Harassment Claims*, 6 DUKE J. GENDER L. & POL'Y 27, 30 (1999).

11. Lyle v. Warner Bros. Television Prods., 12 Cal. Rptr. 3d 511, 513 (Cal. Ct. App. 2004).

12. *See id.*

that, in her presence, the writers continually referred to oral sex, related their personal sexual fantasies about having sex with the show's actresses, would draw pictures of breasts and vaginas on cheerleaders in a dirty "coloring book," would discuss the supposed infertility of one of the show's actresses, would constantly use the word "schlong," and would simulate masturbation during meetings.[13] This conduct occurred nearly every day for the four-month period of Lyle's employment.[14] Lyle's suit was brought under California's Fair Employment and Housing Act ("FEHA"),[15] an act which the court interprets using the federal standards for hostile work environment claims.[16]

The court held that the evidence was sufficient to establish a prima facie case of sexual harassment under the Act.[17] The court reasoned that this was especially the case for Lyle because her job required her to attend the writers' meetings and observe the offensive conduct, essentially making her a captive audience.[18] The defendant-employer argued that even if a prima facie case had been established, no liability existed in its particular circumstance, because "Friends"

> deals with sexual matters, intimate body parts and risque humor, [and] the writers of the show are required to have frank sexual discussions and tell colorful jokes and stories (and even make expressive gestures) as part of the creative process of developing story lines, dialogue, gags and jokes for each episode.[19]

The court, however, was not very receptive to defendants' novel claim of necessity in the hostile work environment context, at least not at the summary judgment stage of litigation. Defendants would be, however, entitled to pursue their theory at trial. According to the court, the context of the harassment is only one factor to be considered in a hostile work environment action and, in this case, there was still a triable issue of fact as to whether the conduct was actually necessary for the writers' jobs.[20]

The Supreme Court of California granted review,[21] and presumably, will decide whether creative necessity can be a defense that will absolve such an employer from liability at the summary judgment stage of

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13. *See id.* at 516.
14. *Id.* at 517.
15. CAL. GOV'T CODE § 12940(a) (Deering 2004).
16. *See* Sheffield v. L. A. County Dep't of Soc. Servs., 134 Cal. Rptr. 2d 492, 498 (Cal. Ct. App. 2003).
17. *Lyle*, 12 Cal. Rptr. 3d at 517.
18. *See id.* at 518.
19. *Id.*
20. *See id.*
21. Lyle v. Warner Bros. Television Prods., 94 P.3d 476 (Cal. 2004).

litigation. The issues to be decided at trial include not only whether the conduct in a creative environment can give rise to a claim under the Fair Employment and Housing Act and Title VII, but also whether such statutes infringe upon the defendants' right to free speech.[22] The free-speech argument is beyond the scope of this Note, but interesting parallels exist between the civil libertarians' arguments and the argument for creative necessity as a defense.[23] The reader must assume the constitutionality of Title VII for the purposes of this Note.

B. A Prima Facie Hostile Work Environment Claim

In order for the reader to better understand the concepts being discussed, a brief overview of a hostile work environment claim is called for. Title VII states, in relevant part, that "[i]t shall be an unlawful employment practice for an employer [to] . . . discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."[24] Many (if not all) states have adopted similar statutes.[25] Much of the wording in most of these state statutes is nearly identical to that of Title VII.[26] In most instances, the state courts engage in the same analysis when hearing a hostile work environment

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22. *Id.*

23. *See* Richard H. Fallon, Jr., *Sexual Harassment, Content Neutrality, and the First Amendment Dog that Didn't Bark*, 1994 SUP. CT. REV. 1 (1994). Professor Fallon points out that what is normally thought of as protected speech, if pervasively displayed out in the open, even though it is not legally obscene or otherwise prohibitable, could, under the existing state of the common law, form the basis for a hostile work environment cause of action under Title VII. *Id.* at 50 (citing Robinson v. Jacksonville Shipyards, Inc. 760 F. Supp. 1486, 1535 (M.D. Fla. 1991)). He goes on to say:

> [I]f an employee of a producer or distributor of such materials could claim that their display violates Title VII, the hostile work environment cause of action could become the engine of suppression reaching far beyond the workplace. To prevent this result, a partial exception to the hostile environment prohibition is probably needed for the workplaces of producers and disseminators of constitutionally protected materials that might, in other contexts, create or contribute to a prohibited hostile environment.

Id. See generally Eugene Volokh, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. REV. 1791, 1843-56 (1992) (arguing that the First Amendment should protect undirected harassing speech from being subject to current harassment law).

24. 42 U.S.C. §§ 2000e-2(a)-2(a)(1) (2005).

25. *See, e.g.*, Fair Employment and Housing Act, CAL. GOV'T CODE § 12940(a) (Deering 2004); Florida Civil Rights Act, FLA. STAT. ANN. § 760.10(1)(a) (LexisNexis 2005); Illinois Human Rights Act, 775 ILL. COMP. STAT. ANN. 5/2-101(E) (LexisNexis 2005); MASS. ANN. LAWS ch. 151B, § 4(1) (LexisNexis 2005); N.Y. EXEC. LAW § 296(1)(a) (Consol. 2005); OHIO REV. CODE ANN. § 4112.02(a) (LexisNexis 2005).

26. *Compare, e.g.*, N.Y. EXEC. LAW § 296(1)(a), *and* CAL. GOV'T CODE § 12940(a), *with* 42 U.S.C. §§ 2000e-2(a)-2(a)(1).

claim as the federal courts do when hearing a claim under Title VII.[27] Because of this, this Note will refer to Title VII when talking about any hostile work environment claim, though the concepts discussed are equally applicable to all similar state statutes.

The Supreme Court first recognized a claim of hostile work environment based on sex under Title VII that was separate from what the public normally thought of as sexual harassment at that time, *quid pro quo* harassment,[28] in *Meritor Savings Bank, FSB v. Vinson*.[29] The Court held that in order to establish a claim for hostile work environment under Title VII, an employee must show that she was subjected to conduct that was "sufficiently severe or pervasive [as] to alter the conditions of [her] employment and create an abusive working environment."[30] The claim evolved through two subsequent cases, *Harris v. Forklift Systems, Inc.*[31] and *Oncale v. Sundowner Offshore Services, Inc.*[32] The Court held that the conduct must be based on the victim's sex and must also be both subjectively and objectively severe or pervasive so as to alter the conditions of her employment, eliminating a previously used requirement that a showing of severe psychological injury be present in order to sustain the claim.[33] Subsequently, in *Oncale*, the Court further defined what it means for the harassment to be "based on sex" and held that a male victim, as a matter of law, could present a claim of hostile work environment even though the harasser was another male employee.[34]

1. "Severe or Pervasive" and the Totality of the Circumstances

Conduct that is not sufficiently severe or pervasive as to create an environment that a reasonable person would find hostile does not fall within the protection that Title VII offers.[35] Determining when such an

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27. *See, e.g.*, Sheffield v. Los Angeles County Dep't of Soc. Servs., 134 Cal. Rptr. 2d 492, 498 (Cal. Ct. App. 2003); Mauro v. Orville, 697 N.Y.S.2d 704, 707 n.3 (N.Y. App. Div. 1999); Trayling v. Bd. of Fire & Police Comm'rs, 652 N.E.2d 386, 393 (Ill. App. Ct. 1995).

28. *Quid pro quo* harassment involves a condition imposed on the employee that she either exchange sexual favors with the harasser or lose some type of employment benefit or fail to be hired. *Cf.* Meritor Sav. Bank v. Vinson, 477 U.S. 57, 65 (1986) (stating how the Court of Appeals for the District of Columbia Circuit defined the different types of harassment below without disapproval). This is not the type of harassment that this Note pertains to; rather, this Note only applies to claims of hostile work environment which do not involve any type of economic or tangible harm but do describe a hostile or abusive working environment. *See id.*

29. *Id.* at 66.

30. *Id.* at 67 (internal quotation marks omitted).

31. 510 U.S. 17 (1993).

32. 523 U.S. 75 (1998).

33. *See Harris*, 510 U.S. at 21-22.

34. *See Oncale*, 523 U.S. at 79-80.

35. *See Harris*, 510 U.S. at 21.

environment exists can only be done by looking at all of the circumstances.[36] Some of the circumstances include the frequency and severity of the conduct, and whether it was threatening or humiliating or merely an offensive utterance.[37] A decision from the Seventh Circuit, *Baskerville v. Culligan International Co.*, found that "[d]rawing the line is not always easy."[38] As the court put it,

> [o]n one side lie sexual assaults; other physical contact, whether amorous or hostile, for which there is no consent express or implied; uninvited sexual solicitations; intimidating words or acts; obscene language and gestures; pornographic pictures. On the other side lies the occasional vulgar banter, tinged with sexual innuendo, of coarse or boorish workers.[39]

In *Baskerville*, the court found that an employee did not make out a claim for hostile work environment under Title VII where, over her entire seven month period of employment, she was continually referred to directly as "pretty girl," where it was suggested that she run around naked, and where she was told that she was the reason the office became hot.[40] The Seventh Circuit stated that Title VII is designed to protect women from work environments that are "hellish" and it is not designed to "purge the workplace of vulgarity."[41] *Baskerville* has been followed by numerous other courts.[42]

2. The "Based on Sex" Requirement

One major component of any hostile work environment suit is the because-of-sex requirement. The "'causation requirement' . . . fulfills a gatekeeping function, allowing courts to distinguish actions prohibited by Title VII from those which, though harmful from the employee's point of view, would be legally permissible."[43] The per se discrimination

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36. *Id.* at 23; McPherson v. City of Waukegan, 379 F.3d 430, 438 (7th Cir. 2004).

37. *McPherson*, 379 F.3d at 438.

38. 50 F.3d 428, 430 (7th Cir. 1995).

39. *Id.* (internal citations omitted).

40. *See id.* at 430; *see also McPherson*, 379 F.3d at 439 (holding that directed comments about the color of the employee's brassiere and isolated sexual propositions were not severe enough to be the basis for a claim under Title VII). *But see* Wyninger v. New Venture Gear, Inc., 361 F.3d 965, 977 (7th Cir. 2004) (holding that conversations tinged with sexual innuendo over telephone with an audience listening, in conjunction with being locked in a room with three other male employees, could rise to the level of severity needed to establish a claim under Title VII because the incidents were both humiliating and threatening).

41. *Baskerville*, 50 F.3d at 430.

42. *See, e.g.*, Johnston v. Henderson, 144 F. Supp. 2d 1341, 1362 (S.D. Fla. 2001), *aff'd sub nom.*, Johnston v. U.S. Postmaster Gen., 277 F.3d 1380 (11th Cir. 2001); Staples v. Hill, No. 3:97-cv-00580, 1999 U.S. Dist. LEXIS 21659, at *15-16 (M.D. Pa. Aug. 20, 1999).

43. David S. Schwartz, *When is Sex Because of Sex? The Causation Problem in Sexual*

rule, originally used in hostile environment cases, was: "whatever other conduct might constitute sexual harassment, and whatever other elements might be required to prove actionable sexual harassment, [any] sexual conduct per se establishe[s] the 'causation' element necessary under Title VII to prove that the conduct was 'because of sex.'"[44] Thus, in *Robinson v. Jacksonville Shipyards, Inc.*, the pervasive posting of nude pictures of women around a shipyard, a practice which was fully encouraged by the management and had occurred for years,[45] was found to be "based upon her sex."[46] In *Robinson*, the court made no inquiry into the causal link between the plaintiff's gender and the posting of the pictures.

The Court has begun to move away from the somewhat antiquated notion that sexual behavior is always motivated by the sex of the victim. In 1998, the Court removed any doubt about whether the "sex per se" rule constituted the law and "disturbed, if not rejected, the unquestioned assumption that sexual conduct in the workplace is per se 'because of sex'"[47] when it announced that harassment between men and women in the workplace is not automatically discrimination because the words used contain sexual content or connotations.[48] This second-generation theory on causation is that in order to sustain the claim, it must be shown that the plaintiff was exposed to disadvantageous terms or conditions of employment to which members of the other sex were not exposed.[49] Where males and females in the same workplace do not receive disparate treatment, no claim under Title VII lies because the harassment is not based on sex.[50]

In most jurisdictions, in order to show that harassment was based on sex, the employee must show in some way that had she been a man she would not have been treated in the same manner.[51] The Court in *Oncale* stated that the employee "must always prove that the conduct at issue was not merely tinged with offensive sexual connotations, but

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Harassment Law, 150 U. PA. L. REV. 1697, 1709 (2002).

44. *Id.* at 1700.

45. 760 F. Supp. 1486, 1493-95 (M.D. Fla. 1991).

46. *Id.* at 1523.

47. Schwartz, *supra* note 43, at 1701.

48. Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80 (1998).

49. *Id.* (quoting Harris v. Forklift Sys., Inc., 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring)).

50. Ocheltree v. Scollon Prods., Inc., 308 F.3d 351, 356 (4th Cir. 2002); Sheperd v. Slater Steels Corp., 168 F.3d 998, 1009 (7th Cir. 1999); *see* Wyninger v. New Venture Gear, Inc., 361 F.3d 965, 976 (7th Cir. 2004); Johnson v. Hondo, Inc., 125 F.3d 408, 412 (7th Cir. 1997).

51. *See, e.g.*, Hayut v. State Univ. of N.Y., 352 F.3d 733, 748 & n.7 (2d Cir. 2003); *Ocheltree*, 308 F.3d at 356; *Sheperd*, 168 F.3d at 1009; Bundy v. Jackson, 641 F.2d 934, 942 n.7 (D.C. Cir. 1981).

actually constituted '*discrimination* . . . because of . . . sex.'"[52] In many jurisdictions, it is no longer the case that sexual joking and teasing, even if designed to provoke the target, is based on sex absent any proof that indicates the teasing would not have occurred had the target been a different gender.[53] For example, in *Johnson v. Hondo, Inc.*,[54] the employee was subjected to constant vulgar insults and admonishments. He was told continually by a coworker to "suck my dick," was called a "faggot," and had to watch as the coworker grabbed his crotch and listen as he made other lewd comments.[55] The court rejected the employee's argument that he was harassed because of his sex, holding that sexual comments and vulgarity are not necessarily always made because of the victim's gender.[56] The court found that the comments specifically complained of could be better described as mere "juvenile provocation" absent proof in the record that indicated otherwise.[57] Such proof may include that the conduct contained a sexual proposition,[58] or at least was motivated by some sexual desire.[59] The bottom line is that "[e]ven if the conduct is sexual in nature, where a plaintiff cannot prove 'but for' causation, an employer should be able to prevail in a sexual harassment case."[60]

What this quick overview of the "because of sex" requirement illustrates is that, in many ways, the courts have almost adopted a pro-employer attitude. Therefore, it does not seem unlikely that a necessity defense is on the horizon. So, with this history in mind we turn back to *Lyle* in order to better understand the court's decision and to define two different scenarios where such a defense is likely to arise, each calling for a different application of the law.

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52. *Oncale*, 523 U.S. at 81 (quoting Title VII); *see also Ocheltree*, 308 F.3d at 356-57 (finding that a vulgar song and simulated sexual acts with a mannequin which were both directed at the employee were not based on sex because the evidence conclusively proved that she would have been exposed to the same atmosphere had she been a male); Duvall v. Midwest Office Tech., Inc., No. 98-2546-JWL, 1999 U.S. Dist. LEXIS 20798, at *3, *19-20 (D. Kan. Dec. 20, 1999).

53. *See Ocheltree*, 308 F.3d at 359 (stating that even if the alleged harassers' goal was to bother the plaintiff with their sexually explicit and vulgar language, "there is no evidence that those participating in the offensive conduct were attempting to bother her *because of her gender*"); *see* also *Johnson*, 125 F.3d at 412.

54. 125 F.3d 408.

55. *See id.* at 410-11.

56. *Id.* at 412. Note that *Johnson* was decided one year before the Supreme Court's decision in *Oncale*.

57. *Id.*

58. *See Oncale*, 523 U.S. at 80.

59. *See Shepard*, 168 F.3d at 1009.

60. Weitzman, *supra* note 10, at 38.

C. *The Future of* Lyle *and the Necessity Defense*

The reason for such a triable issue of fact in *Lyle*, the court stated, was, for example, that no characters on the show ever pantomimed masturbation.[61] In essence, the court was saying that the exact conduct that occurred needed to be shown to have been used in a show. As writers know, however, simply because the offensive conduct *itself* was never used in the show, it is necessary as a way of "pulling back" a joke, even if it be a clean one.[62] This concept was actually testified to by the show's executive producer. The substance of his testimony was that a writer's tale about receiving oral sex from a prostitute he thought was a woman, but was actually a man, served as the basis for a "Friends" storyline in which one of the characters is kissed in the dark by a person he thought to be a woman but was actually a man.[63]

It seems that the court's opinion is that there is a triable issue of fact as to whether the oral-sex-from-a-prostitute story was necessary for the writers to come up with the idea for the storyline which only involved a kiss. Whether or not it was necessary is almost irrelevant because it is the motivation for the conduct that should be questioned and not the necessity of it. When the inquiry is focused on motivation, the result is a conclusion that the story would have been told whether or not Ms. Lyle was in the room. This is the essence of Warner Brothers' argument.

The way that Warner Brothers is arguing the case is not what one normally thinks of as an actual affirmative defense based on necessity. Warner Brothers' main argument on appeal is that the Court of Appeal erroneously ignored the current state of the law with respect to the "because of sex" and "severe or pervasive" requirements using the creative necessity of the workplace as a type of social context basis.[64] Without raising a necessity defense, Warner Brothers could simply argue

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61. Lyle v. Warner Bros. Television Prods., 12 Cal. Rptr. 3d 511, 521 (Cal. Ct. App. 2004), *review granted, depublished by*, 94 P.3d 476 (Cal. 2004).

62. *See* Christopher Noxon, *Television Without Pity*, N.Y. TIMES, Oct. 17, 2004, § 2, at 1. Based on interviews with various television show writers, Mr. Noxon reported that writers sometimes use offensive jokes in order to "pull back" a clean joke. He quoted Jon Sherman, who spent five years working writing for "Frasier" as saying that "[a]n offensive remark . . . can be 'a sharp stick that you poke the room with.'" *Id.* The joke may help to move the script along. For example, the writers on the television show "Friends" told a story to coworkers about having oral sex with a prostitute who turned out to be male. This story became the basis for a "Friends" episode in which a character kisses a man in a dimly lit bar. "That's what writers mean when they talk of 'pulling back' a joke from a 'first blurt.'" *Id.* (quoting Marshall Goldberg, general counsel to the Writers Guild of America). This process occurs even in writers' rooms for "clean" shows such as "Sabrina the Teenage Witch." *See id.*

63. *Lyle*, 12 Cal. Rptr. 3d at 521.

64. *See* Respondents' Opening Brief on the Merits at 4, Lyle v. Warner Bros. Television Prods., No. S125171 (Cal. Sep. 17, 2004), 2004 WL 2823287.

the case on these two points. They chose to raise this novel defense, though, so the court had to deal with it, and it probably preserved the issue for appeal. The way the court answered the question was by saying that necessity itself does not automatically absolve an employer from liability but it can be a factor for the jury to consider in its deliberations.[65]

It seems that the *Lyle* case actually raised two different issues aside from the First Amendment issue. First, the one the court answered, is does the necessity of an employer to use vulgarity and offend its employees outweigh the rights that an employee receives under Title VII? Second, even if the necessity itself does not absolve an employer from liability, can the creative environment of these types of workplaces be used to contest the prima facie case by showing that the motivation for the conduct was not "based on sex"? The answer to both of these questions should be, "yes," and by looking at the exceptions recognized today in current discrimination law the answer becomes abundantly clear. These exceptions will be discussed in Part II, but, first, the two different questions that come out of *Lyle* call for some further factual enlightenment.

The answer to each issue depends on the actual factual scenario it is raised in. These scenarios are defined by the type of conduct that one is talking about. Two types have been identified—directed conduct and non-directed conduct. The distinction between directed and non-directed conduct is an important one to be made when analyzing any hostile work environment claim, but it becomes especially important if a defendant-employer is trying to assert a necessity defense. For the purposes of this Note, "directed conduct" is conduct that is either: a) aimed directly at the victim whether or not the victim is the subject of the offensive remarks or conduct; or b) is about the victim whether or not it is directly aimed at her. In the first instance, the conduct has a direct effect on how the employee feels and may affect her work by putting her in such an uncomfortable situation. In the latter instance, the conduct has a direct effect on how others perceive and treat the victim, thus contributing to a hostile environment later on, regardless of whether the victim was there to witness the offensive conduct. "Non-directed conduct" is that which the employee is not either the subject or target of, but still occurs in the employee's presence. In this situation, the proof problem that the plaintiff-employee has is that the conduct, though offensive to her and a reasonable person, did not occur because of the employee's sex and is

65. *Lyle*, 12 Cal. Rptr. 3d at 518.

thus not actionable.[66]

The distinction between directed and non-directed conduct is one that is made in many courts' analyses. For example, in *Duvall v. Midwest Office Technology, Inc.*, the female employee alleged that obscene jokes told by two of her coworkers while they were outside on cigarette breaks and vulgar remarks the plaintiff overheard when she walked in on conversations (of which she was not a part) constituted sexual harassment under Title VII.[67] The specific remarks involved the use of vulgar language to describe female body parts.[68] The employee never alleged that any of these remarks were made directly at her, though some other remarks were.[69] The court denied summary judgment to the defendant, but in so doing, recognized that there is a strong argument to be made that the vulgar remarks and jokes "would have taken place regardless of plaintiff's sex, as plaintiff was neither a participant in nor a target of these alleged conversations or words."[70] The two types of conduct that can occur greatly affect how the courts should treat hostile work environment claims once an employer claims necessity. Two different factual scenarios illustrate why and the response to each can be found in Part III of this Note.

1. Scenario 1

In Scenario 1, the employee is one like Ms. Lyle. She simply works in a place where she continually overhears the offensive material and becomes a witness to vulgar conduct. None of the conversations are about her; none of the behavior is engaged in for her "benefit"; and none of it is aimed directly at her. She is simply a bystander. In most cases where this situation arises, like in *Duvall* for example,[71] the court simply goes through the normal steps it takes to decide these cases. Was it because of sex? Was it severe or pervasive to a reasonable person? If the answer to either question is "no," then the case is summarily adjudicated for the employer. A social context/necessity defense in this Scenario,

66. *See supra* Part II.B.2, notes 30-34 and accompanying text. I do not dispute that it is possible for such conduct still to be "because of sex" if the plaintiff could prove that the harassers were talking loudly enough for the employee to overhear their conversation or see their conduct in order to purposefully bother the employee despite the employee not being the subject of the conduct or conversation. Such a permutation of facts could then be properly classified as directed conduct and an exception to the definition of non-directed conduct.

67. Duvall v. Midwest Office Tech., Inc., No. 98-2546-JWL, 1999 U.S. Dist. LEXIS 20798, at *3-4 (D. Kan. Dec. 20, 1999).

68. *See id.* at *4.

69. *Id.*

70. *Id.* at *19-20. Because of other factual disputes in the case, the court denied defendant's motion for summary judgment. *Id.*

71. *See supra* text accompanying notes 67-70.

however, may be too easy of a way out because it could provide these employers with a type of liability shield. What if the employer, or one of its employees, *is* actually engaging in this behavior in order to make the environment hostile for the plaintiff? Necessity in this situation cannot bar her recovery outright, so we should borrow a framework of production from disparate treatment cases in order to deal with the problem. Application of this framework is reserved for Part III.

2. Scenario 2

In Scenario 2, the same employee is directly spoken to and the motivation for speaking to her may be "because of" her sex because the writers are trying to get a female perspective on whatever it happens to be they are discussing. These types of businesses have been dubbed "communicative workplaces" by one commentator.[72] These communicative, creative workplaces include television sets, writers' rooms, radio stations, magazine and newspaper offices, etc.[73] They may have a special need to use vulgarity or obscenity, to post pornographic or offensive artwork and photographs on their walls or even to distribute it to their employees in order to get feedback. When this behavior, however, becomes subjectively offensive to the employee and, in any other context, would be objectively offensive so as to satisfy the requirements for a prima facie claim, the needs of the employer to engage in such activity become trampled on by Title VII and the businesses that engage in such conduct would be, in essence, taxed for their behavior if they are forced to engage in litigation or pay a hefty settlement amount. Applying a necessity defense to Scenario 2 is obviously the more controversial proposal because many of the issues raised in Scenario 1 have already been solved by standing precedent—all the court needs to do is look at them in a new light.

Applying a necessity defense in Scenario 2 does have its critics. Professor Joanna Grossman argues that making the standard more lenient for comedy writers, a field traditionally dominated by men, would lead to broader implications; for example, that "women will continue to feel out of place in the environment."[74] Admittedly, one of the purposes of Title VII is to make all working environments welcome

72. Miranda Oshige McGowan, *Certain Illusions About Speech: Why the Free-Speech Critique of Hostile Work Environment Harassment Is Wrong*, 19 CONST. COMMENT. 391, 393 (2002).

73. *Id.*

74. Joanna Grossman, *Are "Friends" Writers "Required" to Engage in Sexual Banter, Even if the Effect is Harassing?*, FINDLAW'S WRIT, May 4, 2004, http://writ.findlaw.com/grossman/20040504.html.

and protective of both male and female's rights. But as Professor Grossman points out, "[t]elling the show's writers that they could not talk about sex would certainly inhibit their ability to invent and draft scripts."[75] So, where does the answer lie then? This Note will provide one possible answer in Part III.

The answers to the questions raised in each scenario above have already been found, but they are hiding in other areas of discrimination law. Once an employer raises a necessity defense in Scenario 1, where the defendant's challenge is to the "because of sex" requirement, a burden-shifting method could be used to force the employee to prove that necessity was *not* the actual motivation for the offensive conduct. This method is borrowed from disparate treatment law. However, Scenario 2 calls for a different approach because it is more of a justification rather than a simple factual contradiction. Applying the business necessity defense from disparate impact cases makes sense and is the approach that this Note advocates. In order to better understand each approach, Part II will outline these defenses.

III. CURRENT EXCEPTIONS RECOGNIZED IN DISCRIMINATION AND HARASSMENT LAW

A. *Disparate Treatment and* McDonnell Douglas

Disparate treatment is not the same as *quid pro quo* harassment or the creation of an abusive working environment. The Supreme Court has stated that disparate treatment is "the most easily understood type of discrimination. The employer simply treats some people less favorably than others because [they are a member of a protected class] . . . . Undoubtedly disparate treatment was the most obvious evil Congress had in mind when it enacted Title VII."[76] It is fairly easy for a plaintiff to bring a disparate treatment claim, for all one has to do is allege that an employer's decision was based improperly on race, religion, gender, etc. This possibility of frivolousness in a plaintiff's claim is surely what led the courts to establish a framework for deciding such claims. The main defense to a disparate treatment claim is a type of necessity argument. However, a defendant really answers by simply contradicting the plaintiff's claim by saying that there was a legitimate reason for the employer's decision that was not based, in any way, on what class the plaintiff happens to be in.

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75. *Id.*
76. Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15, (1977).

Due to the tension between the needs of the employer and the rights of the employee, the Supreme Court has carefully laid out a framework of proof. The plaintiff must first establish a prima facie case of discrimination.[77] This typically means that she must show she belongs to a protected group and that an employment decision or practice had an adverse effect upon her; however, this is only one means of production and is not meant to be the only way to establish a claim since different factual scenarios may call for different approaches.[78] Once a prima facie case has been established, it is incumbent upon the employer to respond with a legitimate, nondiscriminatory need for its actions.[79] The burden then switches back to the employee to show that the employer's stated reason was a pretext to hide unlawful discrimination.[80]

Weinstock v. Columbia University illustrates how this burden-shifting principle applies. There, the plaintiff challenged the denial of her tenure.[81] Under the university's system, the grant of tenure was achieved through a rather complicated process of recommendations, university committee hearings and votes.[82] After successfully passing the first few rounds of review, the plaintiff was denied tenure because, as the defendant alleged, her record of publication and scholarship was weak when compared to other tenured professors.[83] The plaintiff claimed that her tenure was denied because of her sex.[84] In granting the university summary judgment, the district court found that the plaintiff had alleged a prima facie case of sexual discrimination and that the defendant had responded with a legitimate, non-discriminatory reason for its decision.[85] At this point in the inquiry, as the Second Circuit pointed out,

> [f]or the case to continue, the plaintiff must then come forward with evidence that the defendant's proffered, non-discriminatory reason is a mere pretext for actual discrimination. The plaintiff must "produce not simply 'some' evidence, but 'sufficient evidence to support a rational finding that the legitimate, non-discriminatory reasons proffered by the [defendant] were false, and that more likely than not [discrimination]

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77. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). The *McDonnell Douglas* standard has been followed numerous times as a simple, orderly way of establishing a disparate impact claim. *See* St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 506-07 (1993); Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 252-56 (1981).

78. *See McDonnell Douglas*, 411 U.S. at 802 n.13.

79. *See id.* at 803.

80. *See id.* at 804.

81. Weinstock v. Columbia Univ., 224 F.3d 33, 37 (2d Cir. 2000).

82. *See id.* at 38.

83. *See id.* at 39.

84. *Id.* at 40.

85. *See id.* at 42.

was the real reason for the [employment action].'"[86]

The court held that the plaintiff failed to produce such evidence. In fact, she produced no evidence that the court felt could support a finding that the university's stated reason was a pretext for any type of discrimination.[87]

Weinstock is one of the "simple" cases where the reader can see that certain business decisions or practices are sometimes misinterpreted by the employee to be discriminatory where they actually are not. The *McDonnell Douglas* framework was laid out in order to level the playing field and offer the employer a defense based on the needs of its business. Defenses in disparate treatment cases, however, fall into a different class of defenses than those used as necessity defenses. While the defense to disparate treatment is a factual contradiction, other necessity defenses are justifications, such as a Bona Fide Occupational Qualification and Business Necessity.

B. Bona Fide Occupational Qualification ("BFOQ")

Discrimination in hiring or placement of employees is tolerated in certain situations where the position in question carries with it a bona fide occupational qualification such as, for example, being of one gender or the other. Title VII provides that when sex is used to discriminate in hiring or placing, it will not be unlawful "in those certain instances where . . . sex . . . is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise."[88] The question that the courts always return to in deciding cases where BFOQ is raised as a defense is whether the sex "requirement" is necessary for the essence of the business. For example, in *Diaz v. Pan American World Airways, Inc.*, the Fifth Circuit held that being a female was not a BFOQ for the position of flight attendant, over the argument by the airline that women are better at reassuring anxious passengers, because "[t]he primary function of an airline is to transport passengers safely from one point to another" and soothing anxious customers is "tangential to the essence of the business involved."[89] In a

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86. *Id.* at 42 (alteration in original) (quoting Van Zant v. KLM Royal Dutch Airlines, 80 F.3d 708, 714 (2d Cir. 1996)).

87. *See id.* at 43-45. The only evidence that the plaintiff produced was that the words, "nice" and "nurturing," were used to describe her in notes and committee meetings and that these words represent a gender stereotype about women which then influenced the ultimate decision. The court found that the use of such words did not represent any sort of stereotype and went on to say that most people would like to be classified as a nice or nurturing person. *See id.*

88. 42 U.S.C. § 2000e-2(e)(1) (2005).

89. 442 F.2d 385, 388 (5th Cir. 1971).

different "flight attendant" case, the employer tried asserting the BFOQ defense in a somewhat different light by arguing that because it marketed its airline using sex, hiring only female flight attendants and ticket workers was essential to the essence of its business.[90] Again, the court did not accept the argument.[91] Examples of cases where being of one sex or the other *is* deemed to be a BFOQ are typically those that involve privacy concerns of the customers.[92]

Could the argument be made that being a "tough-skinned" female is a BFOQ in those certain instances where the workplace is full of vulgarity and obscenity? The answer is definitely "no," but it is important to note that the courts are willing to extend some latitude to employers when they have legitimate reasons for certain discriminatory practices. This same latitude should also be extended to employers who have legitimate reasons for engaging in "harassing" behavior. While the BFOQ defense does not provide the answer, the business necessity defense does.

C. Disparate Impact and Business Necessity

Disparate impact claims are different from disparate treatment claims. Disparate impact claims arise when, without discriminatory intent, an employment practice has an adverse effect on one particular group recognized as a protected class under Title VII, rather than an employer actually discriminating through words or conduct against a member of the protected class.[93] The language in Title VII states: "[i]t shall be an unlawful employment practice for an employer . . . to limit, segregate, or classify his employees . . . in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because [he is a member of a protected class]."[94] The Supreme Court has said that "[t]he Act proscribes not only overt discrimination but also practices that are

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90. Wilson v. Southwest Airlines Co., 517 F. Supp. 292, 293 (N.D. Tex. 1981).

91. *See id.* at 302.

92. *See, e.g.*, Jones v. Hinds Gen. Hosp., 666 F. Supp. 933, 935-36 (S.D. Miss. 1987) (holding that the termination of female nurse aides in favor of males was not unlawful due to privacy concerns of the patients where the majority of the male patients objected to being exposed to female nursing assistants); Fesel v. Masonic Home of Del., Inc., 447 F. Supp. 1346, 1352-53 (D. Del. 1978) (holding that being female was a legitimate BFOQ for nurse aides in a nursing home where many of the residents were female and nurse aides were responsible for intimate personal care including dressing, bathing, toilet assistance and catheter care).

93. *See* BARBARA LINDEMANN & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 9-10 (Paul W. Cane, Jr. ed., 3d ed. 1996).

94. 42 U.S.C. § 2000e-2(a)(2) (2005).

fair in form, but discriminatory in operation."[95] Thus, the Court held that where a general intelligence test and high school education were required in order to be promoted within a company, and that policy acted to exclude African Americans from career advancement, Title VII was violated and the practice was found to have a disparate impact on African American workers despite the employer having no discriminatory intent in utilizing the test.[96] In so holding, though, the Court stated that "[t]he touchstone is business necessity."[97] If the practice could have been shown to be related to job performance, no claim would lie.[98] Title VII now embodies this principle saying:

> An unlawful employment practice based on disparate impact is established under this title only if . . . a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity.[99]

After *Griggs*, it was permissible to have an employment practice which discriminated against a certain class so long as it could be shown that such policy was required for the job in question. Thus, a policy that police officers were required to be able to run 1.5 miles in a certain time, a policy that had a disparate impact on women, was justified as being necessary for the safety of the officers;[100] a policy that firefighters had to pass a test requiring them to carry a 280-pound hose 150 feet that could not be shown to be related to the position of firefighter and had a disparate impact on women violated Title VII;[101] and it was error for a district court not to allow the introduction of evidence to show that a high school education requirement was consistent with business necessity in a case where the requirement had a disparate impact on African American employees.[102]

Typically, in a disparate impact case, the framework of proof is

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95. Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).

96. *See id.* at 432.

97. *Id.* at 431.

98. *See id.* The Court found that because there was evidence that, before the policy was instituted, employees with and without high school educations performed just as well and were promoted just as often, there was no necessity to have such a test as it would have been unrelated to job performance. *See id.* at 431-32.

99. 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2005).

100. Lanning v. Se. Pa. Transp. Auth., 308 F.3d 286, 289-90 (3d Cir. 2002).

101. Pietras v. Bd. of Fire Comm'rs, 180 F.3d 468, 471, 476 (2d Cir. 1999).

102. EEOC v. Joint Apprenticeship Comm. of the Joint Indus. Bd. of the Elec. Indus., 186 F.3d 110, 115-16 (2d Cir. 1998).

similar to that in disparate treatment cases. Once the plaintiff has established a prima facie case, the defendant carries the burden of production whereby he must respond to the allegation with a business justification for the challenged employment practice.[103] This burden shifting method, and the related one used in disparate treatment cases, provides the courts with a simple framework to use in deciding these types of claims. The cases do sometimes go to a jury to be decided, but if the plaintiff cannot meet her burden of persuasion at the summary judgment stage of litigation, the case is decided in favor of the employer. Utilizing these frameworks, the necessity defense in the hostile work environment arena could be examined as well. Part III will illustrate how and why.

IV. APPLYING NECESSITY TO HOSTILE WORK ENVIRONMENT CLAIMS

A. Scenario 1

The *McDonnell Douglas* framework mentioned above[104] could also be employed in hostile work environment cases if and when an employer claims that the offensive conduct is actually part of a legitimate need of the business. There is no need to come up with a separate, novel framework because the *McDonnell Douglas* burden-shifting method will serve the same ultimate goals in hostile work environment cases as it does in disparate treatment cases. Those goals are, of course, judicial efficiency, protection from jury nullification and fundamental fairness. Introducing a novel method at this point in the evolution of the hostile work environment cause of action may cause more problems than it solves. Therefore, this Note advocates applying the *McDonnell Douglas* method for two reasons. First, it is generally known to practitioners in the field and many of the questions surrounding it have already been answered. Second, it is simple in its application and would only need to be tweaked a little, if at all, in order to make it fit hostile work environment claims.

Just like in any cause of action, the plaintiff would plead the necessary elements of a typical hostile work environment claim: 1) she is a member of a protected class; 2) she was subjected to conduct which she found to be offensive and unwelcome; 3) the conduct would be offensive to a reasonable person; and 4) the employer should be held

103. *See id.* at 120.
104. *See supra* Part III.A.

liable.[105] Next, in the employer's answer, the employer would admit that the offensive conduct did occur and state as an affirmative defense that the motivation for the conduct was not the plaintiff's sex; rather, it was motivated by a legitimate need of the business or task being performed.[106] The defendant would then move for summary judgment and, at that hearing, it would be incumbent upon the plaintiff-employee to come forth with sufficient evidence to show that the defendant-employer's stated reason is merely a pretext to hide the true motivation for the conduct—the employee's sex. The judge would then make his finding and, if there is no evidence of actual harassment, dismiss the case; but if there is evidence the case would go to the jury and the context of the environment could still be considered as part of the totality of the circumstances.

It is well known that any affirmative defense is typically subject to limitations and/or that different factual scenarios call for a different application of the defense. For example, the severity or pervasiveness of the conduct is not an issue that is raised in the defense (and may even be conceded),[107] but still could constitute a second reason for summary judgment, if not conceded, so long as the circumstances permit. In addition, some scenarios are more amiable to the defense than others. Cases that are similar to Scenario 1 are the "easy" ones for a creative necessity defense because of the type of conduct one is talking about. The inquiry into the motivation in such situations helps to protect employers. Applying the burden-shifting method protects employees from the "liability shield" that an outright necessity defense would offer employers so long as she can meet her burden.

In Scenario 1, where the offensive conduct complained of consists of mostly, if not all, conversations that are overheard or actions that are witnessed from afar, the inquiry into its motivation becomes much simpler. Indeed, this was the situation in *Lyle* and is the situation where the defense would be the easiest for the employer to prevail on. A plaintiff might be hard-pressed to produce sufficient evidence to show that non-directed conduct was merely a pretext to hide discriminatory

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105. The detail involved in pleading each of those steps is obviously more complicated but I believe the reader can understand what the basics of the claim are from the material set forth in Part II *supra*.

106. Obviously, the employer might choose to either admit or deny the objective severity of the conduct. The employer would treat the defense as an alternative defense if the latter strategic course of action is followed.

107. The pervasiveness of the issue may be raised simply to show that it is commonplace for the employees to engage in such conduct as part of their job, but it still is not material to the defense. Likewise, the severity of the conduct might be admitted or denied, depending on the circumstances, but either way is not a substantive part of the necessity defense.

intent; for what evidence could the plaintiff possibly produce? Perhaps there is testimony from another coworker that the actors had agreed to engage in such conduct in order to bother the plaintiff because they knew she would be offended; but such evidence, even if it is found in the first place, would only tend to show that the actors agreed to bother the plaintiff, not that they agreed to bother her because of her sex. A court could still properly grant summary judgment to the employer in such a situation under an *Ocheltree*-like precedent.[108] One might say that *any* evidence the plaintiff could find in such a situation that *would* tend to show a discriminatory, actionable motive would be unique to the plaintiff's situation. Whether she could find evidence or not, though, one might wonder why adding this defense to the employer's arsenal in this Scenario is needed, or, more importantly, whether the defense changes the law already set in the field. The answer is that it does not.

Recall Scenario 1. The facts are that the offensive conduct was not directed at the employee but did occur in her presence; she found it offensive; and in any other context a hostile work environment claim might succeed. Applying a necessity defense in this situation is not troublesome because standing precedent has already left room for such a defense even if it has never actually arisen in a "live" case yet. In denying Baskerville's claim,[109] the Seventh Circuit stated that

> [i]t is no doubt distasteful to a sensitive woman to have such a silly man as one's boss, but only a woman of Victorian delicacy—a woman mysteriously aloof from contemporary American popular culture in all its sex-saturated vulgarity—would find [the employer's] patter substantially more distressing than the heat and cigarette smoke of which the plaintiff does not complain.[110]

A reasonable person can see that any conduct protected by a creative necessity defense is really only the "sex-saturated vulgarity" of "American popular culture" that the *Baskerville* court refused to find actionable.

One must remember, however, that much of the conduct in the creative environments about which the defense might be raised, if such conduct serves as the grounds for a claim, will probably not be severe enough to constitute harassment due to the fact that it will be non-directed, non-humiliating, and non-threatening. But Title VII requires

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108. *See* Ocheltree v. Scollon Prods., Inc., 308 F.3d 351, 359 (4th Cir. 2002) (stating that even if employees' goal was to bother the plaintiff with their sexually explicit and vulgar language, "there is no evidence that those participating in the offensive conduct were attempting to bother her *because of her gender*").

109. *See supra* Part II.B.1.

110. Baskerville v. Culligan Int'l Co., 50 F.3d 428, 431 (7th Cir. 1995).

the harassing conduct to be severe *or* pervasive.[111] In determining whether the harassing conduct is pervasive the courts look at the totality of the circumstances[112] and always look at the facts on a case by case basis.[113] Now, one would think that the "totality of the circumstances" includes taking into account the work environment and the individuals who work there; however, one court has specifically rejected this view.[114] In *Trayling*, the employee-victim alleged that the verbal statements made by her coworker, Trayling, concerning sex toys and Trayling's ex-wife's affairs, and asking what the employee thought about certain lingerie constituted sexual harassment under Title VII.[115] Trayling also brought a sexually explicit videotape into work which he watched and commented on with other coworkers.[116] The employee overheard the comments and then Trayling asked if the employee wished to view the videotape; she replied that she did not.[117] There was also an incident regarding a book entitled, "How to Satisfy a Woman Every Time (and have her beg for more)," where Trayling suggested that the employee read the book and use the techniques described therein with her husband.[118] The employee also testified that Trayling engaged in discussions with her about his sexual experiences with his ex-wife.[119] Trayling made the argument that under *Harris*, when deciding what is objectively severe or pervasive, the working environment and the individuals in that environment must be considered.[120]

The Illinois Appellate Court rejected the argument, holding that to accept it would "confuse normalcy with reasonableness" and that "normal" within the context of a specific environment does not render the conduct reasonable from the objective standpoint.[121] The court went on to state that the FEHA and Title VII should protect individuals regardless of what category of working environment they are in, "whether they work in a firehouse or a coffee house."[122]

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111. Harris v. Forklift Sys., Inc., 510 U.S. 17, 20 (1993).
112. *Id.* at 23.
113. EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11(b) (2005).
114. Trayling v. Bd. of Fire & Police Comm'rs, 652 N.E.2d 386, 394 (Ill. App. Ct. 1995).
115. *See id.* at 389-90.
116. *Id.*
117. *Id.*
118. *Id.* at 391.
119. *Id.*
120. *Id.* at 394.
121. *Id.* at 394-95.
122. *Id.* at 395. *But see* Rodgers v. W.-S. Life Ins. Co., 12 F.3d 668, 674 (7th Cir. 1993) (holding that, in a claim of hostile work environment based on race, the Court may consider "the lexicon of obscenity that pervaded the environment of the workplace both before and after the plaintiff's introduction into its environs") (quoting Daniels v. Essex Group, Inc., 937 F.2d 1264,

The court got the right result in that specific case and, indeed, any court holding the same would be correct in every similar circumstance. However, there is a great distinction to be made between an environment where it is "normal" for sexual discussions to take place and an environment that *requires* sexual topics to be discussed. The latter types of workplaces are exactly those that can be described as communicative workplaces. They are those that are "organized around the purpose of communicating an idea or message, sparking conversation, argument, or thought among patrons"[123] and employees.[124] The environments that could possibly claim creative necessity are exactly these types of places: magazines, television and radio sets, e-zines (internet magazines) and writers' rooms. The very purpose of going into the office in these environments is to discuss whatever topic happens to be pressing at the moment and get feedback and ideas from one's colleagues.[125]

Imagine for a moment that the same facts in *Trayling* occurred in an office which posted online blog entries (journal entries) in an attempt to draw in readers. One employee who is assigned to write a blog about sex toys or certain types of lingerie asks the "victim" of the harassment for her advice, or what she may think about the lingerie herself. Maybe, later in the week, he is writing another blog about cheating spouses and ways to keep a cheating spouse interested in you sexually. He then tells his "victim" that his wife happens to be cheating on him, he has been reading a book entitled, "How to Satisfy a Woman Every Time (and have her beg for more)," and even suggests that the "victim" read the book and try the techniques. This conduct, though not severe in the objective sense, continually occurs on a more than daily basis, making it pervasive, and thus actionable, under Title VII. This is the kind of situation that Title VII makes no exception for and, with the exception of *Lyle*, the courts have never had to address it. Indeed, one commentator has recognized that a "serious problem arises if the speech that creates the hostile work environment is an inherent part of the employer's

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1274 (7th Cir. 1991)).

123. McGowan, *supra* note 72, at 393.

124. *See generally* Amici Curiae Brief in Support of Respondents, The Writers Guild of America et al. at 5, Lyle v. Warner Bros. Television Prods., No. S125171 (Cal. Feb. 16, 2005), 2005 WL 847609.

125.

> The personality of a room varies from show to show, but the essential dynamic is what Wells, of *ER*, *The West Wing*, and *Third Watch,* likens to ". . . jazz improvisation. One idea leads to another. There is a rhythm to the room. Anyone who has ever been around a campfire knows how it can escalate. With my son it's about excrement, with adults it's about sex."

Id. (alteration in original).

business."[126]

Some courts have, indeed, left room for such a scenario or at least mentioned it in dicta. For example, the Supreme Court posed the following hypothetical in *Oncale*: A football coach slaps one of his players on the rear before a game.[127] One could argue that such a slap is not necessary in order for the employer, through its agent the coach, to do its job. Whether it is necessary or not is irrelevant because, as the Court said, "that inquiry requires careful consideration of the social context in which particular behavior occurs and is experienced by its target."[128] The Court opined that in such a situation the player's working environment would not be sufficiently severe or pervasive to constitute a hostile one even though the same exact behavior would be if experienced by the coach's secretary in the office.[129]

The Court's reasoning admittedly is slightly flawed in that, under its hypothetical, it is inquiring more into the relationship between the target and the harasser rather than the relationship between the harasser and his job. Despite this flaw, the mere fact that the Court said that some "[c]ommon sense, and an appropriate sensitivity to social context, will enable courts and juries to distinguish between [unactionable conduct] . . . and conduct which a reasonable person in the plaintiff's position would find severely hostile or abusive[,]"[130] is a showing that the Court recognizes a need for employers to have some sort of defense based on the nature of the working environment itself. Three years later, the Court held that an offhand sexual remark made during a screening of job applications, which both plaintiff and defendant were required to participate in, was not sufficiently severe or pervasive to become actionable under Title VII because the context within which it occurred justified the making of the remark.[131]

Imagine that the Supreme Court is deciding any one of the above-mentioned cases. Maybe the Court views the pornographic video, book, and lingerie from *Trayling*. The justices are having a hard time making a

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126. Volokh, *supra* note 23, at 1853.

127. Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 81 (1998).

128. *Id.*

129. *Id.*

130. *Id.* at 82.

131. *See* Clark County Sch. Dist. v. Breeden, 532 U.S. 268, 269 (2001). What happened was that the female plaintiff, a male supervisor, and the defendant, another male employee, met to review the psychological evaluation reports of four job applicants. One report showed that one of the applicants had made a comment to a coworker where he said, "I hear making love to you is like making love to the Grand Canyon." At the meeting, which included the plaintiff, the supervisor looked at the defendant and said, "I don't know what that means." The defendant then said, "Well, I'll tell you later," and both men laughed. *Id.* at 269.

decision so they view the video and skim the book repeatedly over the course of a few months in order to come to a decision. What if Justice O'Connor complained that this behavior constituted a hostile working environment for women? One would probably answer that question by saying that it would be absurd for her to make such a claim. The public's common sense would tell it that the Court was just doing its job; that its intent was not to create an abusive working environment but to decide the case; that in that specific context a reasonable person in Justice O'Connor's position would not find the behavior to be severe or pervasive as to alter the terms of her employment. One might point out that this hypothetical is not exactly the same situation in which a harassment suit would be brought, but the absurdity of the claim is the point that needs to be made.

To make the hypothetical more realistic, and more in line with typical hostile-work-environment suits, imagine that one of the male justices makes a lewd comment about the video to which all of the other male justices laugh. This is a more realistic picture of a situation in which Justice O'Connor might be able to bring a claim that might succeed if the law stands as it exists today. The defense to such a claim, undoubtedly, would be that the justices' comments were not discriminatory; to wit, not based on sex. The question, then, would go to the jury assuming that the pervasiveness issue survived summary judgment. But when the necessity defense is invoked, as it would be in the amended hypothetical just described, it is probably fair to say that the motivation for watching the videos and discussing them in the first place was the job being performed and not the gender of Justice O'Connor. The question remains, though: what about the lewd comment made afterward? This is the typical problem when faced with these "motivation" questions. I argue that in order to find the motivation, we must get down to the basics and not make illusory conclusions that could likely be made in any other context. For example, an offhand remark about the video in Justice O'Connor's presence, even if made repeatedly, is still motivated by the job that *was* performed rather than the job *being* performed and at neither point in time was it motivated by Justice O'Connor's gender. The comment would have been made had Justice O'Connor been there, or not, or had been a woman, or not. Once we get to the point in time that the comment is made solely because she is a woman, even if it did not start out that way initially, the necessity defense would no longer apply; Justice O'Connor would then be able to prove that the proffered reason was a pretext to hide prohibited conduct.

It should be incumbent upon the employee to show a judge that there is a question of fact regarding the motivation for the conduct once

the employer claims that the conduct or comments were necessary for the job being performed. Shifting the burden is the way to accomplish this just like when employers invoke the "legitimate reason" defense in disparate treatment claims. The employee must prove that the alleged harassment was motivated by discriminatory intent rather than by the legitimate requirements of the job being performed, not to a jury, but to a judge, and as this section illustrates, doing so does not come into conflict with any of the current precedent in the area. Scenario 2 is where applying a necessity defense may be more controversial, but is also essential.

B. Scenario 2

Directed conduct cases present a more difficult situation if the employer wishes to plead necessity, but still not an impossible one. Proof of discriminatory motive in such situations would be easier for the plaintiff to produce under a burden-shifting method and would also tend to present a more triable issue of fact. The most basic type of evidence a plaintiff could produce to show discriminatory motive would be evidence of unlawful discrimination or similar conduct in the past that was not related to the job being performed at the time. Obviously, any sexual propositions or questions of a personal and sexual nature are difficult to defend by saying that they were required, but the defense is not impossible. For example, when the offensive conduct is directed at the employee as part of a creative process it may be harder for the plaintiff to find evidence that shows had she been a man the same conduct would not have been directed at her. The reader should refer to the hypothetical based on the *Trayling* case discussed above for an example of such a situation.[132]

Because the defense contains an implied question concerning the legitimate needs of the employer, measures must be in place in order to ensure that employers are not being protected too much—that they are not going too far and completely overshadowing the rights of the employee in order to further their business objectives. There is a cost-benefit balancing test that needs to occur. Perhaps Howard Stern's infamous "Intern Beauty Pageant," while "necessary" for the purposes of the show, encroaches too much on the intern's right to be able to work in a place free from insult and ridicule.[133] The need of the employer to

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132. *See* discussion *supra* Part IV.A.

133. The beauty pageant is an event where the interns on the show are asked to come out in swimsuits, answer personal, sexual questions and be judged by a panel. Without asking Howard Stern, I would assume that no one is required to participate so the "unwelcomeness" of the conduct

engage in such conduct loses when balanced against the employee's rights in such situations, and society should require the employer to pay for it. But when the employer's need is legitimate, fundamental fairness dictates that there must be some sort of justification for the employer's behavior.

Again, necessity in hostile work environment cases has poked its head out in a small amount of cases. The Court of Appeal of California, ironically the same court that heard *Lyle*, was faced with deciding whether an individual employee in his personal capacity, rather than as employer, could be held liable under the FEHA for discrimination.[134] In deciding this question, the court found it necessary to make a distinction between discrimination and harassment, a decision which, in the end, produced a finding that the legislature did not intend for supervisory employees to be held personally liable for discrimination claims but did intend liability for harassment claims.[135] The court concluded that "the Legislature's differential treatment of harassment and discrimination is based on the fundamental distinction between harassment as a type of conduct *not* necessary to a supervisor's job performance, and business or personnel management decisions—which might later be considered discriminatory—as *inherently necessary to performance of a supervisor's job*."[136]

While hostile work environment claims usually take the form of harassment, I argue that in cases where the conduct at issue is required in order to perform a job—where the necessity defense would apply to a hostile work environment claim—the claim *is* really one that takes a form similar to a disparate impact claim (unintentional discrimination) and subjecting the claim to the same standards as such. In harassment claims, the main inquiry is on the motivation for the conduct,[137] and in disparate impact claims, the inquiry is almost solely on the consequences of the conduct.[138] The *Griggs* court found that this was Congress's intent.[139] I argue that when a claim is made that the "harassing" conduct was justified by business necessity, the inquiry should shift from the

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would be hard to prove by a plaintiff who voluntarily participated. For the purposes of this discussion, however, I ask that the reader assume that all other elements of the claim have been satisfied including causation.

134. Janken v. GM Hughes Elecs., 53 Cal. Rptr. 2d 741, 743 (Cal. Ct. App. 1996). The language of FEHA is essentially the same as that used in Title VII, though there is no individual liability under Title VII. The distinction that the court recognized, however, is what is important.

135. *See id.* at 745.

136. *Id.* (emphasis added).

137. *See supra* Part II.B.2.

138. *See supra* Part III.C.

139. Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971).

motivation of the conduct to the consequences. At that point the claim becomes one for disparate impact because the defense implies that the *directed* conduct at issue was "an inherent part of the employer's business,"[140] and the "motivation" question falls by the wayside as it is now only the consequences of the conduct that form the basis for the suit—the employee's subjective feelings of abuse.

All of the decisions discussed thus far leave room for such a necessity defense, albeit not explicitly, in that each court always focuses its inquiry on 1) the motivation for such conduct; and 2) the objective severity looking at the totality of the circumstances. Any employer claiming a necessity defense could simply argue on these facts at trial and convince a jury that the environment was not a hostile one. This Note, however, argues that the case should never even get that far. Business/creative necessity needs to exist as a justification available to employers to dispose of such claims at the summary judgment stage of litigation. Subjecting employers to costly suits for harassment, when the conduct is part of the offending employee's job, and thus really becomes a disparate impact case, is not something that this author believes Congress intended when it enacted Title VII. The effects of not allowing for a business justification defense would be chilling, as one of the amici briefs for Warner Brothers points out:

> If affirmed, the Court of Appeal decision would leave writers and those who employ them with a constitutional Hobson's choice: either censor their process of collaborating or face costly harassment claims. As anyone in the entertainment industry will attest, studios and production companies would feel compelled to place a lawyer in every writing room, assigned to pipe up when the talk turned too blue or ruffled too many feathers . . . . [A] lawyer acting as a manners cop would obviously have a particularly chilling effect.[141]
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> . . . .
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> This assumes, of course, that a woman would be hired at all.[142]

There may be situations like Scenario 2 where the conduct at issue was actually directed at the employee because of her sex and, assuming there are no other questions of fact about the prima facie case, the employer had a need to engage in such conduct. These are the situations when justifying the behavior becomes much more controversial. In many

140. Volokh, *supra* note 23, at 1853.

141. Amici Curiae Brief in Support of Respondents, The Writers Guild of America et al., *supra* note 124, at 5 (citation omitted).

142. *Id.* at 19 n.9.

ways, such a justification would mirror the tried "assumption of the risk" defense. Indeed, some courts have allowed this defense in the past.[143] One controversial case, *Rabidue v. Osceola Refining Co.*, specifically held that the prevailing work environment before the plaintiff entered it is one factor that must be considered when evaluating a hostile work environment claim,[144] but cases such as *Trayling*, discussed above, have rejected that position.[145] However, now that it seems a necessity defense may be making its way into hostile work environment actions, perhaps the courts should revisit the issue, because not allowing a defense based on prevalence where the conduct is not part of the job is very different than not allowing one where the conduct is required.

C. The "Evidence"

Even after all of this discussion, the question still remains: is being vulgar and obscene necessary in some situations in order to be creative? There seems to be at least some evidence that it is. As mentioned above, the executive producer for "Friends" testified that it is.[146] He is not the only one that feels this way. Pang-Ni Landrum told the Los Angeles Times that she, as a writer for "Malcolm in the Middle," witnessed vulgar behavior in the writers' room all the time utilized as an impetus for comedy writing. She described to the Times that

> [o]ne of the writers, a talented artist, would come in with a drawing you would expect in a sixth-grade boys' locker room, of a penis going into a politician's mouth or a pile of feces under a straining weightlifter. It's sophomoric and scatological and stupid, and the entire staff would look forward to it because it put them in a completely silly frame of mind.[147]

The article went on to say that

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143. *See, e.g.*, Blankenship v. Parke Care Ctrs., Inc., 913 F. Supp. 1045, 1051 (S.D. Ohio 1995), *aff'd*, 123 F.3d 868 (6th Cir. 1997) (holding that the general workplace atmosphere and the plaintiff's expectations when entering that environment should both be considered when evaluating a hostile work environment claim); *see also* Kelly A. Cahill, Special Project, *Hooters: Should There Be an Assumption of Risk Defense to Some Hostile Work Environment Sexual Harassment Claims?*, 48 VAND. L. REV. 1107 (1995) (arguing that assumption of the risk defenses should be permissible in hostile work environment claims).

144. 805 F.2d 611, 620 (6th Cir. 1986), *overruled as stated in* Scheske v. Kirsch Div. of Cooper Indus., No. 93-2404, 1994 U.S. App. LEXIS 16132 (6th Cir. June 21, 1994) (the prevailing work environment includes "the lexicon of obscenity that pervaded the environment of the workplace both before and after the plaintiff's introduction into its environs, coupled with the reasonable expectation of the plaintiff upon voluntarily entering that environment").

145. *See supra* text accompanying notes 114-22.

146. *See supra* note 63 and accompanying text.

147. Op-Ed, *No Room for Delicate Ears*, L.A. TIMES, Feb. 6, 2005, at M6.

> [a]n outsider might consider the drawings vulgar—even the writers might consider them vulgar—but vulgarity is not the issue; the issue is writing a quality script, under highly competitive and pressurized conditions. The writers on "Malcolm in the Middle" thought of those drawings as a catalyst to creativity, and anything that can help generate 11 hours of quality product was very welcomed indeed.[148]

The Associated Press reported that a veteran writer, David Klein, said, "[writers' rooms are] one of the few places on earth where everybody says exactly what's on their minds," and, "[i]t's as dark and nasty as possible."[149] David Bernstein, a professor at George Mason University School of Law, stated that

> [t]he very concept of brainstorming, which is based on the spontaneous contribution of ideas and has provided the first spark of inspiration for many great (and not-so-great) works, would be seriously compromised in any workplace, classroom, or studio if everyone had to self-censor for sexual content before throwing out a thought. It doesn't seem like much of an exaggeration to predict that the drying up of new, edgy, and provocative art would not be far behind.[150]

The amount of evidence that such is the case is astounding. The amici briefs to *Lyle* continue to show that an adverse decision for Warner Brothers would mean that all communicative workplaces would be significantly impaired and the freedom that one expects to have in such a workplace would no longer exist. Specifically, the Writers Guild of America, Directors Guild of America and Screen Actors Guild collectively said that

> [f]or a piece of drama or comedy to succeed, there must be seamless opportunities among writers, directors, and actors to speak and explore without restraint. . . . It is impossible to imagine how writers, directors, and actors could work together if they had to worry about doing only what was "creatively necessary" in order not to offend a worker on the set. . . . With *All in the Family*, (where the main character was a bigot), *Seinfeld* (the masturbation show, among others), and *The Producers* (making fun of Hitler), some people in the room or on the set might well have found the creative discussions offensive and even tried to stop them, but all we can say is, thank heavens no one listened.[151]

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148. *Id.*

149. *'Friends' Sex Harassment Lawsuit Takes on Hollywood Tradition*, CHI. TRIB., Dec. 23, 2004, Redeye Ed., at 10.

150. David E. Bernstein, *Un*Friend*ly Environment*, NAT'L REV. ONLINE, Aug. 20, 2004, http://www.nationalreview.com/comment/bernstein200408201037.asp.

151. Amici Curiae Brief in Support of Respondents, The Writers Guild of America et al., *supra* note 124, at 16-17.

The American Booksellers Foundation for Free Expression, along with its other amici, said that "[t]o require the participants to justify after the fact the "necessity" of minor segments of the creative process represents a misunderstanding of the creative process."[152]

Perhaps the most concrete evidence that this type of talk is necessary to produce comes from another set of amici, mostly newspaper publishers, who urge us to remember the recent stories involving the Abu Ghraib prison scandal, where there was an alleged rape of a teenage boy, one prisoner was allegedly pulled around by his penis and had a water bottle forced up his rectum, and the alleged sodomization of an Iraqi soldier by an army officer. They remind us that this story was of "unquestionable importance," but also remind us that the decisions to tell these stories had to result from a discussion among the writers and editors of the papers at an office somewhere where employees probably had to hear the gruesome details of these accounts and allegations.[153] While the final product, the production of the stories, is ultimately protected by the First Amendment, "[t]hat protection is illusory. . . if the publishers could face legal action by a newsroom employee who was offended by the discussions taking place during the editorial process, and be forced to defend why each statement made during the internal discussions was "necessary" to the story."[154]

There is actually ample evidence from people in the field that tends to show that vulgarity is necessary as part of the creative process, even on shows such as "Malcolm in the Middle," an inherently clean, family oriented show. How the courts are going to solve the issue of necessity in the hostile work environment context may prove tricky, because using sex talk, admittedly, might deter most women from seeking jobs in such environments in the first place. This is the problem that Title VII was designed to protect against. Again, the burden-shifting method used in disparate impact cases provides at least one workable answer to this problem. Once an employee brings a claim for hostile work environment under Title VII to the courts and establishes her prima facie case, the defendant should be entitled to show the court that there was a legitimate need for the behavior. Only when the employee can then show that business necessity was a mere pretext to hide true harassment should the case continue on.

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152. Amicus Curiae Brief of American Booksellers Foundation for Free Expression et al. at 3, Lyle v. Warner Bros. Television Prods., No. S125171 (Cal. Feb. 16, 2005), 2005 WL 847605.

153. *See* Amicus Curiae Brief of California Newspaper Publishers Assoc. et al. in Support of Defendants and Respondents at 25, Lyle v. Warner Bros. Television Prods., No. S125171 (Cal. Feb. 16, 2005), 2005 WL 847607.

154. *Id.* at 26.

It almost seems that this should be the common-sense conclusion once the whole story is told when the employer is of the type that this defense would apply to. The logical proposition is that harassment is harassment when it is meant to harass. If the motivation was not to harass, and was required by the job being performed, then there was no harassment and it is only the consequences of the conduct that are at issue; making the case one of disparate impact. Over time, the burden-shifting framework used in disparate impact cases could prove to be the correct way to go about deciding these cases; but for now it would be sufficient for the *Lyle* court to conclude that no reasonable jury could find that using vulgarity and obscenity in a comedy writers' room for a show that deals with sexual matters was not necessary for the purposes of writing the script, and grant judgment in favor of Warner Brothers. The decision would sound through this nation, carrying with it the reflections of a deeply grateful citizenry for the court's steadfast commitment to one of the real purposes of Title VII, protecting employees from environments that are so bad that no reasonable person could possibly stand to work there. This is not the case in *Lyle* and cannot be the case in other similar working environments.

V. CONCLUSION

Necessity defenses arose in discrimination suits for a reason—to protect employers when they may have a legitimate need to discriminate. It is time to extend the necessity defense to harassment claims because, in some instances, the employer may have a legitimate need to be harassing. As this Note has illustrated, applying a necessity defense in situations such as Scenario 1, where the normally actionable harassment is non-directed, few problems arise. Once the fact-finder inquires into the motivation for the harassing conduct he should conclude that it was not based on the sex of the employee and is, thusly, non-actionable. The judge can make that determination on summary judgment. Only when the employee can respond by showing that the employer's proffered claim of necessity was pretext, which would be difficult, should the case continue on to trial. The more difficult questions arise when the harassment is directed at the employee but for legitimate reasons. Getting a female employee's "take" on a new comedy script, for example, may or may not be necessary, but it is, at least, a legitimate justification for the conduct. Submitting the necessity question in directed conduct cases to the jury may be the only way to resolve the problem. It may also be that the burden-shifting framework used in disparate impact cases could apply equally as well in directed-conduct

cases. Either way, the defense is not even available to employers at the moment. This Note has argued is that the courts at least need to acknowledge that necessity may be a legitimate defense to hostile work environment actions.

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